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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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BRIEF OF NATIONAL CATHOLIC COMMITTEE ON SCOUTING, GENERAL COMMISSION ON UNITED METHODIST MEN OF THE UNITED METHODIST CHURCH, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS AND THE LUTHERAN CHURCH-MISSOURI SYNOD AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Amici are the largest religious sponsors of Scouting in the United States.[1] Nationally, *amici* and their affiliated denominations sponsor over 50,000 Scouting units and almost 1.2 million boy scouts. In New Jersey, over 20,000 scouts are affiliated with *amici*. Among Scouting's many supporters, there are none more important than *amici*.

1. *Amicus* National Catholic Committee on Scouting oversees the Scouting ministry of the Catholic Church. Nationwide, the Catholic Church sponsors over 355,000 scouts and almost 10,000 Scouting units, making it the third largest sponsor of Scouting units among religious institutions in the United States. In New Jersey, the Catholic Church is the largest religious supporter of Scouting, sponsoring over 14,000 scouts and about 370 Scouting units.

2. *Amicus* General Commission on United Methodist Men of the United Methodist Church ("United Methodist Men") is the church-wide organization within the United Methodist Church authorized to direct and coordinate the activities of the Church's Scouting ministry throughout the denomination. Nationwide, the United Methodist Church sponsors over 421,000 scouts and almost 12,000 Scouting units, making it the largest single sponsor of individual scouts and the second largest sponsor of Scouting units. In New Jersey, the United Methodist Church sponsors over 8,000 scouts and almost 200 Scouting units.

There are other groups affiliated with the United Methodist Church that have expressed an opinion as to whether Boy Scouts of America should be forced to accept homo-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that they authored this brief in whole, and no person or entity, other than the *amici curiae*, made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court.

sexual Scout leaders. However, the United Methodist Men is the church-wide organization authorized to oversee and manage Scouting in the United Methodist Church.

3. *Amicus* The Church of Jesus Christ of Latter-day Saints sponsors over 400,000 scouts and over 30,000 Scouting units nationwide, making it the second largest sponsor of scouts and the largest single sponsor of Scouting units in the United States. In New Jersey, The Church of Jesus Christ of Latter-day Saints sponsors over 700 scouts and about 60 units.

4. *Amicus* Lutheran Church-Missouri Synod sponsors approximately 1,000 Scouting units nationwide, including units in New Jersey.

SUMMARY OF THE ARGUMENT

For almost a century, Boy Scouts of America and many of this nation's religious organizations have been involved in a close partnership to develop the moral character of young men. In the early days, dating back to the early 1900s, this partnership was virtually exclusive, with an overwhelming number of Scouting units sponsored by religious entities. *See* WILLIAM D. MURRAY, THE HISTORY OF THE BOY SCOUTS OF AMERICA 527 (1937) [hereinafter "HISTORY"]. Today, recognizing the important character development that BSA champions, civic groups and other secular organizations have also invested themselves in Scouting. Comparatively speaking, however, churches and other religious organizations continue to take the leading role. More than six out of every ten Scouting units in America are chartered by religious organizations, with these *amici* sponsoring almost 70% of religiously affiliated units.

The lower court's decision—which on its face appears to apply to all Scouting units in the State of New Jersey—creates great uncertainty for *amici* and the Scouting units

they sponsor. As related in more detail below, Scouting is an integral part of the youth ministries of these *amici*. State intrusion into these programs, whether through New Jersey's Law Against Discrimination ("LAD") or through some other means, raises constitutional concerns of the highest order.

The lower court's First Amendment analysis is especially disconcerting because for decades these *amici* have grounded their decisions affecting the membership, leadership, and staffing of their Scouting units in the long-protected freedoms of association and speech.[2] At least as far as the lower court is concerned, those protections are now gone, replaced by a mandate that Scouting units in New Jersey admit, as leaders of young boys, individuals who do not subscribe to or live the basic moral tenets of Scouting and its sponsoring organizations. It is difficult to conceive of a set of circumstances that would create greater uncertainty for Scouting in general, or for the specific Scouting programs sponsored by these *amici*. Indeed, one of these *amici* would withdraw from Scouting if the government were allowed to force BSA to alter its standards regarding homosexual Scout leaders. The others would be forced to reevaluate their sponsorship, with the serious possibility of arriving at the same conclusion.

First Amendment intricacies aside, the very notion of government having the power to control the selection of youth leaders in private, value-inculcating organizations is deeply troubling. Much like the prohibition against governmental interference with the selection of clergy, *see Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952),

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[2] Historically, *amici* have also relied upon the Free Exercise Clause to protect such decisions. Since *Employment Division v. Smith*, 494 U.S. 872 (1990), however, and because the New Jersey law at issue here is ostensibly "generally applicable" and "neutral," it remains very unclear whether the Free Exercise Clause would protect *amici* in the administration of their Scouting units.

private, voluntary, noncommercial organizations like Scouting have always had the freedom to choose their own leaders. Throughout our history, that freedom has been "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Thus, with many other private groups in this country, *amici* have long assumed it was "beyond debate" that the "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the [Constitution]." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). This basic right is threatened by the decision below. The Court's guidance is required to clarify whether organizations like BSA and *amici* still have the right to select youth leaders according to their own moral codes, or whether the state now has the power to regulate such sensitive matters.

ARGUMENT

I. THE HOLDING OF THE COURT BELOW CREATES SERIOUS UNCERTAINTY ABOUT WHETHER THE RELIGIOUS SPONSORS OF SCOUTING HAVE THE RIGHT TO SELECT SCOUT LEADERS ACCORDING TO SCOUTING'S TRADITIONAL GUIDELINES AND THEIR OWN UNIQUE RELIGIOUS CRITERIA.

At the outset, an important preliminary point bears some mention. *Amici* all share a common, firmly held belief that sexual relations should occur only within the bonds of marriage. They believe and teach that extra-marital sex is wrong, and that one who engages therein has committed an immoral act and is not qualified to lead impressionable youth.

Amici's view of extra-marital sexual relations holds regardless of whether the specific sexual acts are homosexual, heterosexual, or bisexual. *Amici* condemn all such acts.

To these *amici*, therefore, the crucial First Amendment issues which arise in this case are not only about the right of a practicing homosexual to serve as a Scout leader. That formulation is far too narrow. Instead, as far as these *amici* are concerned, the question is whether BSA has the right to exclude an individual from a leadership position in Scouting because that individual engages in conduct contrary to Scouting's fundamental moral tenets. The mere statement of the question in this form illuminates what is at stake for Scouting in general and for these *amici* specifically: It is no less than the right to select for themselves the leaders who will train up Scouting's next generation and, by so doing, determine the values and ideals to be represented in Scouting in the coming century.

A. Scouting Is an Expressive, Value-Inculcating Program That Many Churches Have Adopted as Part of Their Youth Ministries.

On the surface, the purpose of Scouting may appear to be recreation and wholesome fun. But to those who created it, and to those like *amici* who continue to sustain it, Scouting is much more than a game. "Those who established Scouting in America deliberately planned to promote Scouting as a Movement." HISTORY at 514. And that is exactly what Scouting is: a character movement—a focused, systematized program for the inculcation of certain character traits in boys. Such traits include trustworthiness, loyalty, kindness, obedience, reverence, doing one's duty to God, and moral cleanliness. *See* THE BOY SCOUT HANDBOOK 9 (11th ed. 1998). By solemn oath, a boy scout promises to strive to be "physically strong, mentally awake, and morally straight." *Id.* ("Scout Oath").

Religion is indispensable to the Scouting Movement. From the very beginning, Lord Robert Baden-Powell, the founder of Scouting, pronounced that "every Scout should have a religion." HISTORY at 500. The foundational

creeds of Scouting—the Scout Law and Scout Oath—enjoin a scout to be "reverent" and to do his "duty to God." To assist in teaching these values, Scouting's founders actively sought to make America's churches full partners in their character movement. They designed the Scouting program so that sponsoring religious organizations could infuse Scouting's broad, nonsectarian religious themes with specific meaning derived from particular religious traditions, thereby making it an effective tool of religious ministry. As Patrick Cardinal Hayes noted during the founding era, "the sponsoring institution, if it be a Church, may take the [Scouting] program as a foundation and build upon it, and around it, its own spiritual program. Hence, the whole boy is served—body, mind and soul." *Id.* at 514. Scouting's religious sponsors have done just that, becoming in the process indispensable allies in the Scouting Movement.

As contemplated by Scouting's founders, each of the *amici* employs the Scouting program in different ways to further its own religious ends. *Amicus* National Catholic Committee on Scouting oversees Scouting in the Catholic Church. Scouting is an important part of the Catholic Church's pastoral efforts to take the Gospel message to both Catholic and non-Catholic youth. Under the guidance of ecclesiastical leaders, local Catholic committees on Scouting direct the Scouting ministries at the diocesan level. The Catholic Church supports Scouting because its high ethics and God-focused programs provide a Christian setting that enables young people to cope with today's weakened moral standards and increased violence. Catholic Scouting has also proved itself to be a time-honored means of shaping Catholic leaders for the future.

Scouting is likewise a substantial and indispensable aspect of the youth ministries of *amicus* General Commission on United Methodist Men. The United Methodist Men employs Scouting's program of character education

as part of its efforts to instill in boys of all faiths the basic principles of morality. Through Scouting, the United Methodist Church helps boys to have faith in God and to prepare for a life of Christian faith and witness. The pastor of each Methodist congregation sponsoring a Scout unit is directly responsible for selecting qualified adult leaders and supervising Scout activities. Methodist Scout leaders must affirm and live Christian values.

Amicus The Church of Jesus Christ of Latter-day Saints uses Scouting as part of the activity program of its "Aaronic Priesthood," the lay priesthood held by all young men in the Church. Thus, although the Church welcomes nonmembers as full participants in its Scouting units, Scouting serves an important religious purpose within the Church. Scouting, including Cub Scouting, is not optional for LDS boys between the ages of eight and fifteen, but rather an integral part of their priesthood training. The bishop of a Church congregation directly oversees Scouting, personally selecting (and releasing) the congregation's Scout leaders in conformity with Church canons and his understanding of God's will. Only those who live in harmony with the teachings of the Church and Scouting are asked to serve as Scout leaders. To provide divine sanction to their Scouting ministries, senior priesthood officers typically set apart new Scout leaders by the laying on of hands.

Lutheran congregations have used the Scouting program for more than seventy years as a resource for Christian ministry to boys and their families. *Amicus* The Lutheran Church-Missouri Synod requires that its Scout leaders promote the boys' loyalty to the Church, Christian faith and conduct, and responsible citizenship. It is the duty of congregational leadership to provide Scouting units with motivation, guidance, and instruction compatible with the Holy Scriptures.

In sum, *amici* have integrated the Scouting program into their youth ministries as a means of instilling in boys and young men moral and religious values. This is Scouting as it was envisioned by its earliest founders. To alter this vision is to alter Scouting itself.

B. The Decision Below Potentially Impacts All Scouting Units, Regardless of the Character of the Sponsor.

There is nothing in the decision below suggesting that the New Jersey Supreme Court intended to limit its ruling to those Boy Scout units which are sponsored by secular entities. Indeed, the ruling expressly acknowledges that religious organizations sponsor many Scouting units throughout the United States. *See* Petitioners' Appendix ("App.") at 9a.

Under the lower court's constricted view of freedom of association and speech, the First Amendment does not protect an expressive organization's membership or leadership decisions unless the clear purpose of the organization is to discriminate against or denounce the class to which the plaintiff belongs. *See* App. at 52a, 55a-57a. None of the *amici* exists to discriminate against or denounce any group; to the contrary, each attempts to reach out in compassion to every person, whether or not that person currently lives church teachings. Thus, the decision below potentially impacts all Scouting units in New Jersey affiliated with *amici*.

C. The Decision Below Brings Grave Uncertainty and Potential Disruption to *Amici*'s Ability to Express Their Views and to Regulate the Selection of Leaders and Role Models As They Inculcate Moral and Religious Values.

The decision below has created grave uncertainty among these *amici* as to exactly what standards govern their Scouting units, and exactly who has the right to decide

whether a particular individual may be included as a member of a unit or may serve as its leader. Given the natural turnover in Scouting leadership, and given their ongoing efforts to sponsor additional units, *amici* must make scores of such decisions in New Jersey (and thousands across the country) every year. They must also continually monitor the conduct and character of scouts and their leaders to ensure that Scouting's values are being taught in a manner consistent with BSA's guidelines and the sponsors' own religious beliefs. The decision below calls into serious question *amici*'s ability to perform these key oversight functions.

Scouting's program for character development is successful because it teaches morality and character not only through lessons, creeds, and activities, but also through the living examples of its adult leaders. A Scout leader has a duty to live and embody Scouting's ideals. In a very real sense, the Scout leader is not merely the messenger—he is also the message of Scouting. Moreover, sponsoring churches often expect their adult leaders to uphold in word and deed the religious teachings of their denominations. Scout leaders, therefore, are powerful role models. They inculcate the message of Scouting less by what they *say* than by who they *are* and what they *do*. It follows that the essence of Scouting—indeed, the very heart of the Movement itself—depends on the criteria used for selecting adult leaders. In Scouting, to change the messenger is literally to change the message.

1. The lower court's decision creates deep uncertainty about—and potentially undermines—*amici*'s ability to communicate their views on morality and character to the young men in their Scouting units. As demonstrated, many of Scouting's religious sponsors employ the Scouting program as a tool of youth ministry, selecting adult leaders as directed and informed by their specific religious beliefs. For most, and certainly for these *amici*, such be-

liefs include the immorality of homosexual conduct. In their central tenets and beliefs, *amici* affirm that marriage is the only venue wherein the good of sexual relations can be realized, and that sexual relations should be limited accordingly. To be sure, in the context of Scouting this message is taught expressly from time to time. But most often it is taught implicitly through role models who embody the message. For these *amici*, installing a Scout leader who openly acknowledges that he engages in homosexual conduct would be fundamentally inconsistent with that message—indeed, it would dramatically disrupt the lesson *amici* seek to transmit to their impressionable youth.[3]

Yet that is precisely what the decision below appears to require. The lower court's First Amendment ruling casts serious doubt on whether the sponsors of Scouting have the right to preserve the integrity of their message by selecting Scout leaders who affirm and live BSA's standards and the sponsors' own beliefs. That doubt alone is sufficient reason to grant the petition.

2. Where, as here, a law substantially disrupts an association's capacity to express its views, that law is virtually certain to violate the First Amendment right to expressive association. In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), this Court explained that the right of expressive association has an important "instrumental" function:

> An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

[3] It is no response that someone (unlike Plaintiff) might successfully be able to conceal his homosexual conduct, or that some other person might be able to hide his extra-marital affair. The Scouting Movement cannot survive, much less accomplish its mission, if its leaders live a double standard. Hypocrisy is lethal to character education. *See* A.2695.

Id. at 622 (citations omitted). In *Roberts*, and subsequently in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *New York State Club Association v. City of New York*, 487 U.S. 1 (1988), this Court determined that the challenged laws did not (or, in *New York State Club*, might not) significantly interfere with the ability of those associations to effectively advance their viewpoints.

However, that is plainly not the case here. The New Jersey Supreme Court's assumption that its decision would have "no significant impact" on the organization (App. at 52a) is without foundation. The decision below threatens to fracture the Scouting Movement, destroying or at least severely diminishing its ability (and with it *amici*'s ability) to express and inculcate the message and values of Scouting. The threat comes from two sources. First and most directly, if the religious sponsors were compelled to appoint Scout leaders who engage in or affirm the legitimacy of extra-martial sexual relations, the Scouting Movement as now constituted would cease to exist. *Amicus* The Church of Jesus Christ of Latter-day Saints—the largest single sponsor of Scouting units in the United States—would withdraw from Scouting if it were compelled to accept openly homosexual Scout leaders. The other *amici* would be forced to reevaluate

their sponsorship of Scouting, with the serious possibility of reaching the same conclusion. The matter is all the more serious because the logic of the decision below extends beyond sexual orientation to belief in God. As religious organizations, these *amici* cannot accept the proposition that the government has the power and the authority to decide who can serve as a leader in an expressive youth ministry, and they are deeply troubled that the government might order churches and other private groups to disregard their moral and religious teachings in this important matter.

To be sure, the lower court's decision does not apply nationwide. Moreover, none of the *amici* has made a final decision as to how it might respond should the impact of the decision be confined to New Jersey—whether to part company with Scouting altogether, to withdraw from Scouting just in New Jersey, or to take some other tack. But without doubt, the decision below creates a serious threat to the existence and vitality of Scouting, at a minimum in New Jersey and probably throughout the United States. Given the extent of their support, losing any of the *amici* as sponsors (in New Jersey or nationwide) would be a serious blow to the Scouting Movement and its ability to express and inculcate its message.

Second, the threat of fragmentation comes from a somewhat less direct angle. The New Jersey court has created a new cause of action to challenge denial of leadership positions based on a number of characteristics. Not only does the State purport to proscribe certain criteria for evaluating potential members and leaders, but the State will have to examine leadership and membership decisions to determine whether they have complied with the state's dictates, in a process not unlike that in an employment discrimination claim. To adjudicate claims of discrimination, courts will have to assess why someone was terminated as a Scout leader or not appointed in the first place—

essentially an inquiry into motive. Because the religious sponsors use Scouting as a tool of youth training and ministry, and take religious considerations into account in the selection of leaders, that inquiry might require an examination of the denomination's religious beliefs, doctrines, policies, and procedures, and how they were carried out in the specific case. As regards the religious sponsors, the holding of the court below thus threatens to excessively entangle government with religion. Other private associations will face analogous problems. It is difficult to see how the government can presume to second-guess the selection of leaders by private, value-inculcating organizations without violating the First Amendment. *Cf. Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450-51 (1969) (holding that civil courts can never "engage in the forbidden process of interpreting and weighing church doctrine").

Thus, the lower court's ruling raises the specter of unconstitutional government interference with important religious affairs and with the comparably important associational interests of other private nonreligious organizations. Even assuming the religious sponsors would be able to mount a successful Free Exercise or Establishment Clause defense against such interference (an issue that is not before the Court), such a defense would carry serious risks for Scouting. The Scouting Movement is a coalition of diverse groups unified by their dedication to instilling in boys certain fundamental character traits, and it would be devastating to split the movement into religious and nonreligious camps, the latter being subject to intrusive government regulations and the former being immune. Scouting units not sponsored by religious groups would be forced to affirm that Scouting's ideals can be fully lived and embodied by a leader who violates BSA's understanding of the Scout Oath and Law, while the religious spon-

sors would remain free to affirm Scouting's original (and true) position.

A character movement like Scouting simply cannot exist with such a patent double standard. A coherent message about Scouting's fundamental values—such as what it means to be "clean" and "morally straight"—is essential because those values define and unify the Scouting Movement; they are the glue that holds Scouting together. It is highly unlikely that Scouting could remain intact if significant parts of the coalition are compelled to operate under fundamentally conflicting standards concerning such an important issue.

Of course, the exact probability of schism is unknown at this time. But the tremors of uncertainty unleashed by the holding below are very real indeed, and very dangerous to the Movement. *Amici* provide immense financial, logistical, and moral support to Scouting. However, their sponsorship is not unconditional—it has always been contingent upon the compatibility of the Scouting program, both in theory and in practice, with their religious beliefs. *Amici* all have express teachings that directly conflict with the import of the holding below. *Amici* simply cannot hold up those who engage in or affirm the legitimacy of extramarital sex as role models for their youth. There is no greater interference with the right of expressive association than the destruction or dismemberment of an expressive organization. This case raises that very real possibility.

3. Finally, it is crucial to note that the uncertainty and confusion caused by the decision below is not limited to issues of sexuality. New Jersey's Law Against Discrimination contains identical protections forbidding discrimination based on gender, marital status, and religion. Under the lower court's cramped First Amendment analysis, must these *amici* now allow girls into their Scout

troops? Must they appoint atheists or agnostics as leaders?[4]

Succinctly stated, the lower court's decision places BSA —and other private, morality-inculcating and character-developing organizations—into a most difficult situation. Defined as a place of public accommodation under state law, and stripped of associational and free speech protections, BSA is facing much more here than just a showdown over whether homosexuals must be allowed to serve as Scout leaders. It is no exaggeration to say that Scouting is in significant jeopardy. Under the mandates of the decision below, its structure, its world view, and its entire belief system about how young men should be taught and who should teach them, is at risk. If the lower court's decision is widely adopted, it is conceivable that Scouting in some form may survive. But it is inconceivable that Scouting will remain what it has been for the past century, or what it is meant to be by those, like *amici*, who now sponsor it.

II. THE LOWER COURT'S DECISION CREATES SIGNIFICANT LEGAL CONFLICT AND PRACTICAL DIFFICULTIES THAT WEIGH HEAVILY IN FAVOR OF GRANTING THE PETITION.

A. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 566 (1995), established or reaffirmed six central principles.

(1) *Symbols and symbolic acts are protected speech under the First Amendment.* " 'Symbolism' "—be it "saluting a flag ([or] refusing to do so)," "wearing an armband to protest a war," or "displaying a red flag"—is a con-

[4] These are not just rhetorical questions. Girls have already sued to gain admission to Boy Scout troops, *Yeaw v. Boy Scouts of America*, 64 Cal. Rptr. 2d 85 (Cal. Ct. App. 1997), and atheists and agnostics have litigated to become troop members, *see Randall v. Orange County Council, Boy Scouts of America*, 17 Cal. 4th 736, 952 P.2d 261, 72 Cal. Rptr. 453 (1998).

stitutionally protected "'way of communicating ideas.'" *Id.* at 569 (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943)).

(2) *Constitutional protection for speech does not depend on an exact message.* "[A] narrow, succinctly articulable message is *not* a condition of constitutional protection;" "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." *Id.* at 569-70 (emphasis added).

(3) *The speaker has a fundamental right to determine the content of the message.* It is a "fundamental rule of protection under the First Amendment[] that a speaker has the autonomy to choose the content of his own message." *Id.* at 573. The "general rule, that the speaker has the right to tailor [his or her] speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Id.*

(4) *The choice of what not to say is implicit in the right of the speaker to choose the content of the message.* "Since *all* speech [including symbolic speech] inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." *Id.* (citations and quotation marks omitted; emphasis in original).

(5) *The participation of unwanted persons or groups in an act of symbolic speech can alter the content of the speech.* "Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade." *Id.* at 572-73; *cf. id.* at 576-77 ("each [unit in a parade] is understood to contribute something to a

common theme"; "the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of a whole").

(6) *Based on the foregoing principles, the right of expressive association also protects a group's membership decisions from forced inclusion of those with different views.* These principles apply equally to the right of expressive association. Hence, "a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Id.* at 581.

The decision below fundamentally conflicts with these principles, and thus with *Hurley*. Most obviously, the court below refused to recognize that the selection of a Scout leader—and indeed the leader himself—is protected symbolic speech. As noted above, a Scout leader is both the messenger and the message of Scouting. To the boys, he is "Mr. Scouting"—the living embodiment of Scouting's ideals, a role model. Who he is and what he does says much more to the boys than the words he speaks. That is the power of a living symbol. That is also its danger, for the selection of the wrong role model can easily undermine the intended message. An openly homosexual Scout leader—or anyone else who openly practices a lifestyle contrary to Scouting's standards—would send the clear message that such conduct is consistent with Scouting's ideals (or at least, that it is *not inconsistent* with those ideals). BSA emphatically does not want to send that message. Under *Hurley*, it cannot be compelled to do so. Yet, in direct disregard of this principle, the court below refused to accord any constitutional protection to the selection of Scouting's most powerful symbol. *See* App. at 66a.

Next, the court below refused to apply associational and free speech protections to BSA because it found that

BSA is not organized for the purpose of opposing homosexuality. *See id.* at 52a.[5] This flatly contradicts *Hurley*'s holding that protection of a speaker's message does not depend on the core purpose of the organization, or on the reason the organization came into being. Contrary to the holding below, the fact that denouncing homosexuality is not the purpose of the Scouting Movement, or that Scout leaders do not often discuss sexual issues, is constitutionally irrelevant. The parade in *Hurley* likewise did not exist to denounce homosexuals or to "disseminate any views on sexual issues" (*id.* at 52a), yet this Court unanimously granted it First Amendment protection from an analogous attack. The conflict is evident.

The same is true of the lower court's ruling that the First Amendment affords no protection to BSA's message because "Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality." *Id.* *Hurley* expressly disclaimed the need for such solidarity as a condition of First Amendment protection: "[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes . . . ." 515 U.S. at 569. There is little doubt that the various groups marching in or providing entries to the Boston parade would, if asked, have very different views on homosexuality. This Court's ruling in *Hurley*, however, held those diverse views to be immaterial. It was the view of the parade *as an organization*—and not the views of its individual members—that counted in *Hurley*, a principle that seems utterly lost on the court below.

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[5] Ironically, while the majority opinion refused to extend First Amendment protections because it was unconvinced that BSA opposed homosexuality as one of its core principles (App. at 52a), the concurring opinion castigated BSA (and others) for supposedly holding "pernicious" and "patently false" beliefs about homosexuals. *Id.* at 97a.

Finally, the lower court turned its back on *Hurley*'s teaching that the membership of an expressive enterprise can affect its message. *See* App. at 65a-66a. The parade in *Hurley* was a living drama, and thus the addition of each new parade unit necessarily impacted its message. *See* 515 U.S. at 572-73 & 576-77. In even deeper and more significant ways, the same is true of Scouting. A Scouting unit is a dynamic association in which the adult leader and the boys express, model, and live certain viewpoints about life. In ways both subtle and obvious, every member impacts the dynamic of the unit and thus its message and meaning. Each troop has its own unique narrative; each is its own human drama. Coercing the inclusion of an unwanted individual who openly admits a lifestyle that runs contrary to Scouting's moral code unavoidably alters the message and meaning of the troop. If nothing else, *Hurley* squarely teaches that when government forces a group to include those with opposing views, First Amendment protections are triggered.

In short, a stark legal conflict exists between recent Supreme Court precedent and the holding of the court below. That conflict alone is reason enough for this Court to grant the petition, especially when it arises in one of the most sensitive and most important areas of constitutional protection.

B. Just as compelling are the practical difficulties that arise as a result of the New Jersey court's decision. If allowed to stand, the lower court's ruling provides a natural springboard for similar legal attacks in other jurisdictions. Indeed, those attacks have already begun. *See* Pet. Br. at 28 n.10. As discussed in more detail by Petitioners, courts in several states have refused to order Scouting to accept homosexual leaders, generally ruling that state "public accommodation" statutes do not apply to BSA. *See id.* at 26-27.

The difficulty for these *amici*—and for BSA as a whole—is that Scouting is a national organization, with regional and national development and training programs, national policies and procedures, and regional and national events. Many of the *amici* administer and sponsor BSA programs through national committees, with guidance from regional, national, or international religious bodies. In this context, a state-by-state development of the law is particularly unattractive for those on both sides of the issue. If, on the one hand, Scouting really has no protection from the First Amendment in the areas of speech and association, BSA should be put on notice as soon as possible, so that together with *amici* and its other sponsors it can determine what type of organization it must become to comply with government dictates and, in that light, whether it can continue to exist. If, on the other hand, Scouting is indeed entitled to constitutional protection in the programs that it offers—as these *amici* strongly believe—BSA is similarly entitled to a timely and expeditious resolution of the matter. Anything less subjects Scouting to a difficult and potentially divisive process, and tremendous uncertainty.

The New Jersey decision presents an unprecedented and previously unimagined impact on Scouting and its programs, arguably much more so than the membership and related issues previously resolved by this Court in *Hurley*, *Roberts*, and *New York State Club*. As this Court determined to hear and decide those cases because of the overriding First Amendment interests involved, so too should this Court grant the petition in this case to clarify the boundaries of free association and free speech as those rights impact upon one of American's most well-known and most cherished youth organizations.

CONCLUSION

The Court should issue a Writ of Certiorari to review the judgment of the Supreme Court of New Jersey.

Respectfully submitted,

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